IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI EX REL. SPRINT MISSOURI, INC.	)	
APPELLANT,	)	
V.	)	**CASE NO. WD 63580**
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,	)	
RESPONDENT	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
DIVISION I, THE HONORABLE RICHARD G. CALLAHAN

APPELLANT'S BRIEF

Lisa Creighton Hendricks - MO Bar #42194

6450 Sprint Pkwy
MS: KSOPHN0212-2A253
Overland Park, KS 66251
Voice: 913-315-9363 Fax: 913-523-9769
lisa.c.creightonhendricks@mail.sprint.com

Paul H. Gardner - MO Bar #25159
Goller, Gardner and Feather, PC
131 East High Street
Jefferson City, MO 65101
Phone: 573-635-6181 Fax: 573-635-1155
E-mail: info@gollerlaw.com

SPRINT MISSOURI, INC. d/b/a SPRINT

Dated: March 12, 2004

TABLE OF CONTENTS

TABLE OF AUTHORITIES

(list all cases in alphabetical order)

Cases

Statutes

JURISDICTIONAL STATEMENT

All proceedings and hearings in this matter before the Missouri Public Service Commission were held at the Commission's principal offices in Jefferson City, Cole County, Missouri. This appeal is prosecuted from the judgment of the Cole County Circuit Court pursuant to Section 386.540.1 RSMo (2000).

STATEMENT OF FACTS

Sprint Missouri, Inc. d/b/a Sprint (hereinafter "Sprint") is a large incumbent local exchange telecommunications company ("ILEC") as defined by Section 386.020 (22) and (30). Sprint is subject to the jurisdiction of the Missouri Public Service Commission (hereinafter "Commission") pursuant to Section 386.250 (2)[1]. (L.F. 13). On August 19, 1999 the Commission granted Sprint status as a price cap regulated company in Commission Case No. TO-99-359. (Id.) This price cap status made Sprint subject to the provisions of Section 392.245 which contains the 1996 price cap revisions to Missouri's telecommunications law.

Effective December 11, 2000 Sprint increased its maximum allowable prices for its residential and business optional Metropolitan Calling Area (MCA) offerings by 8 % without increasing its rates for this services. (L.F. 52). Sprint has optional MCA offerings in three geographic areas identified as Tier 3, 4 and 5 (Id.) Twelve months later, on December 11, 2001, Sprint again increased its maximum allowable prices for those tiers by 8% without increasing its rates for this service. (L.F. 11-12, 52). On March 13, 2002 Sprint filed revised tariff sheet number 200200766 designed to increase the residential and business monthly non-basic service rates for the optional MCA Plans in Tiers 3, 4 and 5. (L.F. 56). Sprint proposed to increase its prices for non-basic services for MCA in accordance with Section 392.245.11, which states in part:

[1]All statutory references are to "RSMo 2000" unless otherwise specified.

> ....The maximum allowable prices for nonbasic telecommunications services of a large, incumbent local exchange telecommunications company regulated under this section shall not be changed until January 1, 1999, or on an exchange-by-exchange-basis, until an alternative local exchange telecommunications company is certified and providing basic local telecommunications service in such exchange, whichever is earlier. Thereafter, the maximum allowable prices for nonbasic telecommunications services of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice of the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices…An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of Section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section.

Sprint's proposed rates in the March 2002 tariff filing were at or below the "maximum allowable prices" approved by the Commission on December 11, 2001 (L.F. 52-53, 151-153). The March 13, 2002 revised tariff sheet had a proposed effective date of May 1, 2002. (L.F. 150).

On March 20, 2002 the Office of Public Counsel (hereinafter "Public Counsel") filed a motion to reject the proposed tariff. On March 28, 2002, the Commission staff made the following recommendation after reviewing Sprint's proposed tariff:

> The telecommunications Department Staff (Staff) has reviewed Sprint's proposed price cap filing for its MCA service in Kansas City for optional tiers 3, 4 and 5 as set forth in Section 392.245. Staff has no objections to the rate changes going into effect. In fact, Staff believes that the Commission has already addressed MCA rate changes as proposed by Sprint. The MCA Report and Order in Case No. TO-99-483, Findings of Fact, states: *"The Commission also finds that it is in the public interest to allow ILECs to exercise the full pricing flexibility that they are statutorily entitled to have. The Commission determines that ILECs are allowed to change their MCA service charges in response to competition brought on by flexible pricing of MCA service by CLECs, subject to statutes and other safeguards against predatory pricing. For price cap companies, that means that pricing flexibility subject to maximum allowable prices under Section 392.245, RSMo."* (Pages 23, 24). Residential and business customers will receive thirty days advance notice regarding the MCA increases as well as a concurrent reminder notice (notices attached). Staff recommends that the Commission approve the proposed tariff revisions to Sprint's P.S.C. MO. Tariff No. 22 with an effective date of May 1, 2002. (original emphasis).

(L.F. 54).

After Sprint and the Staff filed responses to Public Counsel's Motion to Reject Tariffs, the Commission issued its Order Suspending Tariff on April 11, 2002 and docketed a contested case styled "In the Matter of the Tariff Filing of Sprint Missouri, Inc., d/b/a Sprint, to Increase the Residential and Business Monthly Rate for the Metropolitan Calling Area (MCA) Plan", Case No. TT-2002-447. (Id.). Public Counsel asserted that the proposed rate increases exceeded the annual percentage allowed by law and urged rejection of the proposed tariff or, alternatively, suspension of Sprint's proposed tariff and the scheduling of evidentiary and public hearings. (Id.) Sprint filed a response in opposition to Public Counsel's motion on March 29, 2002 and argued that Section 392.245 required the Commission to approve the tariff because it increased rates to amounts at or below the "maximum allowable prices" approved previously by the Commission. (L.F. 151). The Commission Staff (hereinafter "Staff") filed a response on April 1, 2002 that agreed with Sprint's statutory interpretation and recommended Commission approval of the proposed tariff sheets. (Id.)

On April 11, 2002 the Commission issued an order suspending the proposed tariff and scheduled a prehearing conference for April 23, 2002. (Id.) Sprint filed a Motion for Reconsideration of the Order suspending the tariff on April 17, 2002 and Public Counsel filed its response in opposition on April 22. (Id.) After the filing of supplemental briefs and comments by Staff, Public Counsel and Sprint, the Commission issued an order on July 25, 2002 further suspending the proposed tariff and scheduling an on-the-record presentation for August 12, 2002. (Id.) The presentation was heard as scheduled and the parties filed post-

hearing briefs. (Id.) After further suspending the proposed tariff on October 17, 2002, the Commission issued a Report and Order rejecting Sprint's proposed tariff by a 3-2 vote, effective October 27, 2002. (L.F. 148-161).

The Commission's rejection of Sprint's tariff was based on a statutory interpretation of Section 392.245 (11) that required Sprint to establish its rates for nonbasic telecommunications services at the maximum allowable prices filed by Sprint.[2] The Commission determined that "the maximum allowable price (or price cap) may be raised no more than eight percent annually by establishing the rates **at** such maximum allowable prices." (original emphasis) (L.F. 155). In the words of the Commission:

> If an ILEC increases its prices by less than eight percent, then the price cap for the following year increases by less than eight percent - and any part of the eight percent annual increase that is not used is lost. Thus, the statute provides a "use it or lose it" price cap mechanism and the maximum allowable price increase

[2]Section 386.020 (34) defines "Nonbasic telecommunicative services as "all regulated telecommunications services other than basic local and exchange access telecommunications services, and shall include the services identified in paragraphs (d) and (e) of subdivision (4) of this section. Any retail telecommunications service offered for the first time after August 28, 1996, shall be classified as nonbasic telecommunications service, including any new service which does not replace an existing service....".

> for the following year is still limited to eight percent. Therefore, Sprint's attempt to "bank" increases violates the Price Cap Statute and the proposed tariff must be rejected.

(Report and Order, L.F. 155).

Sprint filed its Application and Motion for Rehearing on October 25, 2002. The Commission denied Sprint's Application and Motion for Rehearing in an order effective December 12, 2002. (L.F. 172-173). Sprint filed its Application for Writ of Review with the Cole County circuit court on January 6, 2003 and the circuit court issued a Writ of Review pursuant to Section 386.510 on January 29, 2003. (L.F. 2-3). The Cole County circuit court entered judgment on November 6, 2003 affirming the Commission's Report and Order. (L.F. 185). Sprint filed its Notice of Appeal on December 12, 2003. (L.F. 189-191).

STANDARD OF REVIEW

This court reviews the decision of the Commission, not the judgment of the circuit court. Office of Pub. Counsel v. Public Serv., 938 S.W.2d 339, 341 (Mo. App. W.D. 1997). Judicial review of Commission Orders is restricted to whether the Commission's order was lawful and reasonable. State ex rel. GTE North v. Missouri PSC, 835 S.W.2d 356, 361 (Mo. App. W.D. 1992). The lawfulness of the order turns on whether the Commission had statutory authority to act as it did. State ex rel. City of St. Joseph v. Pub. Serv. Comm'n., 713 S.W.2d 593, 595 (Mo. App. W. D. 1986). There is no presumption in favor of the Commission's resolution of legal issues. Atmos Energy Corp. v. Public Service Com'n., 103 S.W.3d 753, 759 (Mo. banc 2003). In determining whether the order is lawful, the reviewing court must

exercise independent judgment and correct erroneous interpretations of the law. State ex rel. Alma Telephone Co. v. Public Service Com'n., 40 S.W.3d 381 (Mo. App. W.D. 2001).

If the Commission's order is lawful, the court must then determine whether the order is reasonable. Atmos Energy, supra. Reasonableness depends on whether the order is supported by competent and substantial evidence on the whole record, whether the decision was arbitrary, capricious or unreasonable, or whether the Commission abused its discretion. State ex. rel. Sprint v. Missouri Pub. Serv., 112 S.W.3d 20, 24 (Mo. App. W.D. 2003).

POINTS RELIED ON

I.

THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN REJECTING SPRINT'S TARIFF UNDER THE AUTHORITY OF SECTION 392.230.3 BECAUSE THE COMMISSION LACKS STATUTORY AUTHORITY TO REJECT A TARIFF FILED IN COMPLIANCE WITH THE PRICE CAP PROVISIONS OF SECTION 392.245 RSMo IN THAT THE COMMISSION'S STATUTORY AUTHORITY TO ENSURE THAT RATES ARE JUST, REASONABLE AND LAWFUL IS BY EMPLOYING PRICE CAP REGULATION UNDER THE AUTHORITY OF SECTION 392.245.

II.

THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN DECIDING THAT SPRINT WAS REQUIRED TO SET RATES AT THE MAXIMUM ALLOWABLE PRICE OR LOSE THE RIGHT TO INCREASE RATES EIGHT PERCENT ABOVE THE MAXIMUM ALLOWABLE PRICE IN THE NEXT YEAR BECAUSE SECTION 392.245 (11) RSMo DID NOT PROVIDE A "USE IT OR LOSE IT" PRICE CAP MECHANISM IN THAT THE PRICE CAP AMENDMENTS TO MISSOURI'S TELECOMMUNICATIONS LAW AUTHORIZES SPRINT TO SET RATES

BELOW THE MAXIMUM ALLOWABLE PRICE WITHOUT REQUIRING SPRINT TO SET ACTUAL RATES AT THE MAXIMUM ALLOWABLE PRICE IN ORDER TO INCREASE ACTUAL RATES THE NEXT YEAR.

ARGUMENT

I.

THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN REJECTING SPRINT'S TARIFF UNDER THE AUTHORITY OF SECTION 392.230.3 BECAUSE THE COMMISSION LACKS STATUTORY AUTHORITY TO REJECT A TARIFF FILED IN COMPLIANCE WITH THE PRICE CAP PROVISIONS OF SECTION 392.245 RSMo IN THAT THE COMMISSION'S STATUTORY AUTHORITY TO ENSURE THAT RATES ARE JUST, REASONABLE AND LAWFUL IS BY EMPLOYING PRICE CAP REGULATION UNDER THE AUTHORITY OF SECTION 392.245.

The Commission asserts in its Report and Order that it has statutory authority to determine whether Sprint's March 2002 tariff filing under the price cap statute was lawful. (L.F. 15-16). The Commission claims that "Section 392.230.3, grants the Commission the authority to determine, after hearing, the propriety of any rate, rental, charge, regulation, or practice filed with the Commission by any telecommunications company" and that this "section also authorizes the Commission to suspend the operation of such rate, rental, charge, regulation, or practice for a period of 120 days plus an additional six months." (L.F. 15). The Commission found that it retained authority under this statute "to suspend a proposed tariff

filed by price-cap regulated companies, and if necessary, conduct a hearing regarding the proposed tariff." (Id.).

The Commission's expansionary conception of its statutory authority under Section 392.230.3 ignores the limitations placed on the Commission's authority by the 1996 price cap revisions to Missouri's telecommunications law contained at Section 392.245. These statutory revisions establish that the Commission's power to ensure that rates for telecommunications services provided by price cap regulated companies are "just, reasonable and lawful" is "by employing price cap regulation." Section 392.245.1. In evaluating the authority claimed by the Commission, we turn first to general principles that shape the Commission's jurisdiction and the interpretation of the price cap revisions to Missouri's telecommunications law that constrain the Commission's jurisdiction over rates charged by price cap regulated companies.

The Missouri Public Service Commission is an agency of limited jurisdiction and has only such powers as are conferred upon it by statute. Inter-City Beverage Co. Inc. v. Kansas City Power & Light Co., 889 S.W.2d 875 (Mo. App. W.D. 1994). The Commission's authority is limited to that specifically granted by statute or warranted by clear implication as necessary to effectively render the specifically granted power and it cannot adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature. State ex rel. Intern. Telecharge, Inc. v. Missouri Public Service Com'n, 806 S.W.2d 680 (Mo. App. W.D. 1991); See also State ex rel Springfield Warehouse and Transfer Company and Sur-way Lines, Inc. v. PSC, 225 S.W.2d 792 (Mo. App. 1949).

Statutory interpretation of the authority conferred upon the Commission by Missouri's telecommunications statutes is an issue of law which the court of appeals reviews de novo. State ex rel. Nixon v. Premium Stand. Farms, 100 S.W.3d 157, 161 (Mo. App. W.D. 2003). In construing statutes, the court must ascertain the intent of the legislature from the language used, give effect to that intent if possible, and consider words used in the statute in their plain and ordinary meaning. Nichols v. Director of Revenue, 116 S.W.3d 583, 585-86 (Mo. App. W.D. 2003). It is presumed that the legislature intended that every word, clause, sentence and provision have effect and that the legislature did not insert idle verbiage or superfluous language in a statute. Hyde Park Housing Partnership v. Dir. of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993). When the legislature amends a statute, the amendment is presumed to have some effect. Knob Noster Ed. v. Knob Noster R-VIII Sch., 101 S.W.3d. 356, 361 (Mo. App W.D. 2003).

A. Section 392.245 RSMo controls the manner in which just, reasonable and lawful rates are established for price cap companies.

Section 392.245.1 states:

> 1. The commission shall have the authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation. As used in this chapter, "price cap regulation" shall mean establishment of maximum allowable prices for telecommunications services offered

> by an incumbent local exchange telecommunications company, which maximum allowable prices shall not be subject to increase except as otherwise provided in this section. (emphasis added).

In August 1999, Sprint entered into and received price cap regulation pursuant to Section 392.245. (L.F. 13). When the Commission granted Sprint price cap status, Sprint became subject to the requirements of Section 392.245.5, as follows:

> An incumbent local exchange company may change the rates for its services....but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable prices established for such services under this section. (emphasis added).

The following language of Section 392.245.11 regulates the amount that a local exchange telecommunications company may increase its rates and the maximum allowable prices for nonbasic telecommunications services:

> [T]he maximum allowable prices for nonbasic telecommunications services of a large, incumbent local exchange telecommunications company regulated under this section shall not be changed until January 1, 1999, or on an exchange-by-exchange basis, until an alternative local exchange

> telecommunications company is certified and providing basic local telecommunications service in such exchange, whichever is earlier. *Thereafter, the maximum allowable prices for nonbasic telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices*.....An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section. (emphasis added)

This case focuses on Sprint's intention to raise its actual prices for its Metropolitan Calling Area ("MCA") plans to levels that are equal to, or less than, the maximum allowable price previously approved by the Commission. The Missouri price cap statute[3] requires price cap companies to establish a maximum allowable price for all services. In accordance with the

[3]Section 392.245.

price cap statute, the maximum allowable price for existing services was initially set based on the actual current tariff rate on December 31, 1998. Beginning January 1, 1999, Section 392.245 (11) authorized price cap regulated companies to increase the maximum allowable price for nonbasic telecommunications service a maximum of eight percent annually.

Sprint has filed twice to increase its maximum allowable prices for MCA service since entering price cap regulation. (L.F. 52). In December 2000, the Commission approved revisions to Sprint's P.S.C. MO. No. 22 tariff that established maximum allowable prices for MCA services that were eight percent above the actual rates separately stated in Sprint's tariff. (Id.). In December 2001, the Commission approved further revisions to Sprint's P.S.C. MO. No. 22 tariff that established an increased maximum allowable price for Sprint MCA service that was eight percent over the maximum allowable price from the previous year. (Id). Sprint did not increase the actual rates in either the December 2000 or 2001 tariff revisions. (Id).

The 2000 and 2001 Sprint tariffs filed under the price cap statute allowed actual rates and maximum allowable prices to be separate and different. However, the Commission's Report and Order in this case ruled that actual rates and maximum allowable prices must be the same if Sprint is to preserve the price cap for the next year. The determination of whether actual prices and allowable rates are separate or equal is crucial in this case as all parties agree that maximum allowable prices can be raised eight percent per year. If the price cap permits actual rates and maximum allowable prices to be set separately, Sprint can lawfully cumulate the year's maximum allowable price without altering the actual rate.

Section 392.245 controls the manner in which just and reasonable rates are established for price cap companies. According to Section 392.245 (11), existing rates serve as the initial cap, and from there the companies are allowed pricing flexibility for non-basic services while limiting a price cap company's opportunity to raise basic rates. This price cap legislation provides a pricing structure for the Commission to apply that gives it to "authority to ensure that rates, charges, tolls and rentals for telecommunications services are just, reasonable and lawful by employing price cap regulation.

Missouri case law clearly establishes that when the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general. Greenbriar Mills v. Director of Revenue, 935 S.W.2d 36, 38 (Mo. banc 1996). Moreover, where a statute limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted, the negative that it cannot be done otherwise. Cook v. Cook, 97 S.W.3d 482, 286 (Mo. App. W.D. 2003).

Although Section 392.200.1 requires that all charges for any services rendered by telecommunications companies shall be just and reasonable, the 1996 revisions to Missouri's telecommunications law apply specifically to the price cap companies. Section 392.245.1 of the price cap statutes states that "[t]he commission shall have authority to ensure that rates, charges, tolls and rental for telecommunications service *are just, reasonable and lawful by employing price cap regulation****. (Emphasis added). Thus, the prescribed manner for the exercise by the Commission's statutory authority to set rates that are "just, reasonable and lawful" for price cap companies is through price cap regulation. Cook v. Cook, supra. As a

result of the price cap revisions, the specific provisions of Section 392.245 prevail over the general provisions of Section 392.200.1 relating to just and reasonable rates. The Commission's decisions regarding rates for price cap companies must comply with Section 392.245 and foreclose the exercise of Commission jurisdiction under Section 392.230.3.

An examination of the price cap legislation establishes that Section 392.200.1 is not intended to apply to price cap companies. Section 392.245.5 allows price cap companies to move out of price regulation upon a finding that effective competition exists for a given service. In addressing the Commission's authority in the event that effective competition is found not to exist, the legislation states that companies will remain under price cap and the maximum allowable prices set forth in subsection (4) and (11) and **only Section 392.200 (4)(c)(2)** will continue to apply. Clearly, the maximum allowable price is to be set only in reference to the just and the just and reasonable price formulas provided in the price cap statute. The Commission's general authority to set "just and reasonable" rates contained in Section 392.200.1 is replaced by the price cap formula.

The conclusions that only the terms of the price cap statutes are to guide the Commission's determination regarding compliance with the maximum allowable price provision is reinforced by the mandatory language of those provisions. The use of the word "shall" is imperative when entities are granted rights dependent on the Commission's action. See State ex rel Springfield Warehouse and Transfer Company and Sur-way Lines, Inc. v. PSC, 225 S.W.2d 792 (Mo. App. 1949). The price cap statute's repeated use of the world "shall" limits the Commission's authority to constrain pricing flexibility and explicitly exempts price

cap companies from the mechanism through which this Commission exercises its general authority to ensure that rates are just and reasonable - Section 392.140.1. See Section 392.245.7. By way of example, Section 392.245.3 states: "....**except as otherwise provided in this statute**, the maximum allowable prices for a company under section 1 **shall be** those in effect on December 31 of the year proceeding..." (emphasis added). Section 392.245.4(b)(2) states "...the Commission **shall approve a change** to the maximum allowable price **filed pursuant to paragraph (a) of subdivision (1) of this section within 45 days of filing of notice by the local exchange company...."** (emphasis added). Sections 392.245.4.5 and 11 provide that the Commission shall approve rates for services **provided that any such rate is not in excess of the maximum allowable prices established for such services under this section."** Therefore, the price cap statutes do not confer authority on the Commission to make further determinations with respect to rate increases if such increases are consistent with the maximum allowable price provisions of the Price Cap Statute.

This conclusion is further supported by the fact that the price cap statutes explicitly exempts price cap companies from the very mechanism through which the Commission exercises its general rate jurisdiction - Section 392.240.1. Section 392.245.7 of the price cap statute states: A company regulated under this **section shall not be subject to regulation under subsection 1 of 392.240.** (Emphasis added). Subsection 1 of 392.240 addresses the ability of the Commission to review rates and set new rates if the Commission determines that any rates offered by telecommunications companies are unjust and unreasonable. The fact that price cap companies are exempted from this authority clearly indicates that the Commission

should evaluate requests to increase rates of price cap companies based solely on the criteria contained in the Price Cap Statute. The price cap statute does not allow an exercise of authority under Section 392.240.1 to override the pricing flexibility it provides.

The fact that the price cap statute limits the commission's general rate making authority over non-basic prices is not surprising. In return for pricing flexibility for non-basic service, Sprint and other price cap companies have agreed that prices for basic services will be unchanged, except as otherwise provided under the price cap statute. Therefore, under the price cap statute, outside of rate re-balancing, the prices for basic services will only change to reflect movement in objective economic measurements, such as the telephone service component of the consumer price index (CPI-TS) or the Gross Domestic Product Price Index (GDPPI). Sprint and other price cap companies assume the full risk that to the extent they are adversely impacted by factors not reflected in the CPI-TS (such as loss of access lines), Sprint will not be able to recover its losses. However, in exchange for assuming this risk with respect to basic services, the Price Cap Statute gives Sprint greater pricing flexibility for non-basic services. Section 392.230.3 does not authorize the Commission to eliminate the pricing flexibility conferred by Section 392.245.

II.

THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN DECIDING THAT SPRINT WAS REQUIRED TO SET RATES AT THE MAXIMUM ALLOWABLE PRICE OR LOSE THE RIGHT TO INCREASE RATES EIGHT PERCENT ABOVE THE MAXIMUM ALLOWABLE PRICE IN THE NEXT YEAR BECAUSE SECTION 392.245 (11) RSMo DID NOT PROVIDE A "USE IT OR LOSE IT" PRICE CAP MECHANISM IN THAT THE PRICE CAP AMENDMENTS TO MISSOURI'S TELECOMMUNICATIONS LAW AUTHORIZES SPRINT TO SET RATES BELOW THE MAXIMUM ALLOWABLE PRICE WITHOUT REQUIRING SPRINT TO SET ACTUAL RATES AT THE MAXIMUM ALLOWABLE PRICE IN ORDER TO INCREASE ACTUAL RATES THE NEXT YEAR.

A. The Commission's Interpretation of the price cap amendments to Missouri's telecommunications statutes is inconsistent with the language and purpose of those amendments.

The Commission's erroneous conception of its statutory authority to set "just, reasonable and lawful" rates other than by employing price cap regulation is compounded by its erroneous interpretation of Section 392.245 (11). In the words of the Commission:

> The Commission finds that the phrase "at such maximum allowable prices" means just that; the maximum allowable price (or price cap) may be raised no more than eight percent annually by establishing the rates **at** such maximum

> allowable prices. If an ILEC increases its prices by less than eight percent, then the price cap for the following year increases by less than eight percent - and any part of the right percent annual increase that is not used is lost. Thus, the statute provides a "use it or lose it" price cap mechanism and the maximum allowable price increase for the following year is still limited to eight percent. Therefore, Sprint's attempt to "bank" increases violates the Price Cap Statute and the proposed tariff must be rejected.

A statutory interpretation that gives meaning to the price cap amendments best serves the purpose and policy of the Missouri's telecommunications law. One of the purposes of price cap legislation is to "[p]ermit flexible regulation of .....competitive telecommunications service..." and "[a]llow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest....". Section 392.185 (5) (6). The price cap amendments serve this purpose by allowing incumbent providers to increase non-basic service without undergoing a rate case if a competitor is offering services in their service areas. See Section 392.245.2 and 11.

When construing a statute, courts must ascertain the intent of the Legislature from the language of the statute and give effect to that intent based on the plain and ordinary meaning of the language used. Carmack v. Missouri Department of Agriculture, 31 S.W.3d 40 (Mo. App. W.D. 2000). Where the language of a statute is clear, a court must give effect to the language as written. Missouri Nat. Educ. Assn. v. Missouri State Bd. of Educ., 34 S.W.3d 266 (Mo. App. W.D. 2000). Courts will look beyond the plain and ordinary meaning of the statute only when

its meaning is ambiguous or will lead to an illogical result which defeats the intent of the legislature. Boone County v. County Employees' Retirement Fund, 26 S.W.3d 257 (Mo. App. W.D. 2000). "Ambiguity," in the context of statutory interpretation, means duplicity, indistinctness or uncertainty of meaning of an expression. J.B. Vending Co. Inc. v. Director of Revenue, 54 S.W.3d 183 (Mo. banc 2001). Ambiguity is not established by the mere fact that litigants disagree over the meaning of the statute. Id.

When the intent of the statute cannot be determined from the plain and ordinary meaning of the words used and the statute is ambiguous, it should be given a reasonable reading and construed consistent with the legislature's purpose in enacting it. Blue Cross and Blue Shield of Kansas City, Inc. v. Nixon, 26 S.W.3d 218 (Mo. App. W.D. 2000). The provisions of a legislative act are not read in isolation but construed together and read in harmony with the entire act. State, Missouri Dept. of Social Services, Div. of Aging v. Brookside Nursing Center, Inc., 50 S.W.3d 273 (Mo. banc 2001). Thus, in interpreting legislation, courts must not be guided by a single sentence, but should look to the provisions of the whole law and to its object and policy. State v. Rousseau, 34 S.W.3d 254 (Mo. App. W.D. 2000).

Applying these principles to the price cap statute, the language clearly contemplates that the rates charged for a service will be a different price than the maximum allowable price. Section 392.245.5 provides:

> "An incumbent local exchange company may change the rates for its services, consistent with the provisions of 392.200, but not to exceed the **maximum allowable prices**, by filing tariffs which

> shall be approved by the commission within thirty days, **provided that any such rate is not in excess of the maximum allowable prices** established for such service under this section." (Emphasis added)

The distinction between actual rates charged and the maximum allowable price under the price cap amendment is further recognized in Section 392.245 (11) which states:

> An incumbent local exchange telecommunications company may change the rates for its services consistent with the provisions of Section 392.200, **but not to exceed the maximum allowable prices** by filing tariffs which shall be approved by the commission within thirty days, **provided that any such rate is not in excess of the maximum allowable price established for such services under this section."** (emphasis added)

Clearly, the legislature gave price cap companies the option to set their actual rates *below* maximum allowable price and still maintain the upper limits of the maximum allowable price. The Commission focuses on one sentence in subsection 11 and decides that there can be no maximum allowable price that is not equal to the actual rate charged the customer. This sentence reads:

> The maximum allowable prices for non-basic telecommunications services of an incumbent local exchange company may be annually increased by up to eight percent for each of the

> following periods upon providing notice to the commission and filing tariffs establishing the rate for such services in such exchanges at such maximum allowable prices.

The fallacy in the Commission's interpretation is that it relies on only one sentence of Section 392.245 (11) and renders subsection 5 and the other portions of subsection 11 meaningless. It also overlooks those provisions of the price cap amendments that allow maximum allowable prices and actual rates to be set separately so as to allow the pricing flexibility that is a stated legislative objective of the Missouri Telecommunications Act. (See Section 392.185).

Legislative intent is determined by reference to the entire statute, including other portions of the price cap amendments contained at Section 392.245. Indeed, Section 392.245 (11) reiterates that a provider may change its rates so long as the rates do not exceed the maximum allowable prices and directs the Commission to approve the tariff changes provided that the rates are not in excess of the maximum allowable prices. If actual rates were always set at the maximum allowable price, there would be no reason to state "not to exceed the maximum allowable prices" and "not in excess of the maximum allowable price" in that last sentence. Unless the Commission preserves the option to set rates below the maximum allowable price, the last sentence of Section 392.245 (11) is rendered meaningless. See State ex rel. Zoological Park Subdistrict of the City and County of St. Louis et al. v. Jordon et al., 521 S.W.2d 369, 372 (Mo. 1977) (Court should avoid interpretations of statutes that lead to

absurd or unreasonable results); State ex rel. Dravo Corp. v Spradling, 515 S.W.2d 512, 517 (Mo. 1974) (same).

B. The price cap legislation as a whole recognizes the distinction between actual rates and the maximum allowable price.

When looking at the entire statute, the legislature addressed actual rates and maximum allowable prices at several places. In subsection 4.5 and 11, the legislature clearly expressed that the maximum allowable price was separate from actual rates and served as a cap on rates:

> An incumbent local exchange telecommunications company **may change the rates** for its services, ..., but not to exceed **the maximum allowable price** (392.245.4.5).

> An incumbent local exchange telecommunications company **may change the rates** for its services,...., but not to exceed **the maximum allowable price.** (392.245.11).

Further, the term "rate" is a defined term in Missouri Public Service law and refers to what is actually charged a consumer for services. See Section 386.020.45. Therefore, the fact that the legislature choose to refer to the cap as a "price" versus a "rate" is important. It means that the rate charged the customer is not the maximum allowable price. Therefore, the legislature never intended for the sentence relied on by the Commission and OPC to be interpreted to require that actual rates equal maximum allowable rates.

Finally, and very importantly, the legislature addressed the Commission's contention that the sentence it relies disallows a carry over of maximum allowable prices in the absence of a rate increase. Section 392.245.5 of the price cap amendments confers upon the Commission the ability to relieve a company of regulation under the price cap amendments. Section 5 also provides the Commission the ability to reimpose price cap regulation. However, it mandates that the Commission reinstate the maximum allowable price cap and that it "shall reflect **all index adjustments which were or could have been filed from all proceeding years since the company's prices were first adjusted pursuant to subsection 4 or 11 of this section.** (emphasis added). Therefore, the legislature did not intend for the maximum allowable price to be based only on actual increases in rates but also based on all adjustments that could have been made during the period that a company is price cap regulated. In other words, the maximum allowable price increases every twelve (12) months by eight percent (8%), regardless of whether a provider actually increased any rates. Therefore, the Commission's interpretation of Section 392.245.11 is inconsistent with the language of the subsection, as well the clear language of the entire section.

Additionally, the Commission's interpretation is unreasonable when put in practice. Under the Commission's interpretation, "the maximum allowable price effectively resets at the rate actually charged to customers at the end of a twelve (12) month period to capture the full eight percent (8%). Then on the first day of the new twelve (12) month period, a provider could decrease its rates by eight percent (8%), but retain the option of increasing the actual rates by sixteen percent (16%) for the following twelve (12) month period. Clearly, the

legislature could not have intended that the Commission, consumers, or the regulated ILECs, would need to engage in such an absurd practice in order to preserve the annual eight percent (8%) increase for maximum allowable prices. Under Sprint's interpretation, this practice is unnecessary.

When read in context of the entire price cap amendments, the language relied on by the Commission merely allows a company to increase its rates up to a maximum allowable price when and if it chooses to make a filing. That statutory language neither mandates that maximum allowable prices must equal actual rates or demonstrates an intent to force providers to increase rates up to eight percent (8%) every twelve (12) months or lose the eight percent (8%) pricing flexibility.

Sprint's interpretation incorporates all portions of Section 392.245. Reading all the language in sub section 11, it explicitly contemplates that actual rates can be set below maximum allowable prices, maintaining that option is clearly a part of what is intended in the single sentence from sub section 11 relied on by the Commission. Further, subsection 5 clearly and unambiguously provides that the maximum allowable price increases cumulate year to year regardless of actual rate increases.

Under Sprint's suggested interpretation - one that allows separate actual rates and maximum allowable pricing - providers are allowed to receive the benefits of pricing flexibility while protecting consumer interest. Clearly, the consumer interest is protected by not forcing providers to increase their rates by a full eight percent per year. If price cap companies know that they can maintain separate rates that are below the maximum allowable prices, and that they

can forego taking a particular year's increase until subsequent years, the incentive to take the full eight percent per year will be reduced. This benefits consumers, provides pricing flexibility, and allows the competitive markets to replace regulation in making pricing determinations.

Under the Commission's approach, Sprint would have had to raise its MCA rates in December, 2000 and then again in December, 2001 to maintain the full pricing flexibility it is entitled to under Missouri statute. Thus, Sprint would have raised actual rates twice over the past two years to be at the same price level as is currently being proposed. Consequently, consumers would have paid eight percent more throughout 2001, and an additional eight percent more for 2002. As a result, consumers would pay substantially more for non-basic service under the Commission interpretation. Consumers benefit from the Sprint approach because they save money when companies defer increases. Companies also benefit from Sprint's approach because they actually have pricing flexibility to react to market conditions and move toward the market-based environment contemplated by the price cap legislation.

The statutory interpretation urged by Sprint considers all the language of the Price Cap statute, as well as the purpose and policies behind the Price Cap Statute. In contrast, the Commission's interpretation leads to unreasonable and absurd results inconsistent with the pricing flexibility intended by the legislation.

CONCLUSION

For the reasons stated in this Brief, Sprint requests that the Court rule that the Commission's order rejecting Sprint's tariff as failing to comply with the Missouri Price Cap Statute is unlawful as it was inconsistent with Missouri Price Cap Statute.

Respectfully submitted,

Lisa Creighton Hendricks – MO Bar #42194
6450 Sprint Parkway
MS: KSOPHN0212-2A253
Overland Park, KS 66251
Voice: 913-315-9363 Fax: 913-523-9769
lisa.c.creightonhendricks@mail.sprint.com
SPRINT MISSOURI, INC. d/b/a SPRINT

And

Paul Gardner
Goller, Gardner and Feather
131 East High Street
Jefferson City, MO 65101

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing Appellant's Reply Brief conforms with Rule 84.06, consisting of 748 lines of text and 7,493 words, that the accompanying disk has been scanned for viruses and it is virus-free, and that a true and accurate copy of the foregoing brief and a copy of the accompanying disk which have all been scanned for viruses and are hereby certified as virus-free, was mailed, via U.S. Mail, this 12 day of March, 2004, to the following parties:

David A. Meyer
Associate General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael F. Dandino
Office of the Public Counsel
P.O. Box 2230
Suite 650
Jefferson City, MO 65102-2230

_____
Lisa Creighton Hendricks